

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

LARRY E. TARRER,

Petitioner,

v.

BUREAU OF PRISONS,

Respondent.

CASE NO. C10-5154BHS

REPORT AND  
RECOMMENDATION

Noted for April 9, 2010

The underlying Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 has been referred to United States Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1)(A) and 636 (b)(1)(B), and Local Magistrate Judge's Rule MJR3 and MJR4.

Petitioner in this case is currently confined at the Pierce County Jail. Petitioner has filed this petition pursuant to 28 U.S.C. § 2241, challenging four drug related convictions arising out of the U.S. District Court. *See* C07-5346RBL (petitioner pled guilty to four felony drug crimes and was sentenced to 120 months of confinement in prison). Petitioner alleges that § 2241 is appropriate because remedies sought pursuant to 28 U.S.C. § 2255 would be inadequate,

1 ineffective, and not available. This court disagrees, and recommends denial of the § 2241  
 2 petition for writ of habeas corpus

### 3 **DISCUSSION**

4 ***PETITIONER'S REMEDY LIES IN A MOTION BROUGHT PURSUANT TO § 2255, NOT § 2241.***

5 28 U.S.C. § 2255 states, in relevant part:

6 A prisoner in custody under sentence of a court established by Act of Congress  
 7 claiming the right to be released upon the ground that the sentence was imposed in  
 8 violation of the Constitution or laws of the United States, or that the court was  
 9 without jurisdiction to impose such sentence, or that the sentences was in excess of  
 the maximum authorized by law, or is otherwise subject to collateral attack, may  
 move the court which impose the sentence to vacate, set aside or correct the  
 sentence.

10 [Omitted]

11 An application for a writ of habeas corpus in behalf of a prisoner who is authorized  
 12 to apply for relief by motion pursuant to this section, shall not be entertained if it  
 13 appears that the applicant has failed to apply for relief, by motion, to the court which  
 sentenced him, or that such court has denied him relief, unless it also appears that the  
 remedy by motion is inadequate or ineffective to test the legality of his detention.

14 Here, on or about May 22, 2007, petitioner was arrested and charged, along with three  
 15 other co-defendants, with several counts of criminal drug possession and trafficking. The matter  
 16 was assigned to the Honorable Ronald B. Leighton. In May 13, 2008, petitioner entered into a  
 17 plea agreement with the government in exchange for a guilty plea on three counts of possession  
 18 of control substances and one count of conspiracy to distribute an illegal substance. Petitioner  
 19 was subsequently sentenced by Judge Leighton to 120 months in prison and to five years of  
 20 supervised release.  
 21

22 Petitioner appealed his sentence. On January 25, 2010, the Ninth Circuit affirmed Judge  
 23 Leighton's sentence, finding that a two-level upward adjustment under United States Sentencing  
 24 Guidelines Manual ("USSG") § 2D1.1(b)(1) for possession of a firearm was applicable and that  
 25 petitioner was ineligible for safety valve relief under USSG § 5C1.2 because he had possessed a  
 26 firearm in connection with the offense.

1 Other than the instant petition, petitioner has not filed a § 2255 motion or other collateral  
2 attack on his conviction or sentence. In the instant petition, Mr. Tarrer claims ineffective  
3 assistance of counsel, involuntary and unintelligent guilty plea, and violation of Appendi. *See*  
4 Appendi v. New Jersey, 530 U.S. 466, 490 (2000)(the Supreme Court held that any fact, other  
5 than a prior conviction, that increases the prescribed statutory maximum penalty to which a  
6 defendant is exposed must be submitted to a jury and proven beyond a reasonable doubt). Each  
7 of these arguments must be properly brought in a § 2255 motion -- not a § 2241 petition.  
8

9 Petitioner states he believes a § 2255 motion would be inadequate or ineffective because  
10 he believes Judge Leighton would be biased in his review of the matter. A mere belief of bias is  
11 inadequate to obviate the requirement that his claims be presented to the sentencing court. To  
12 demonstrate bias, petitioner must show that the sentencing judge holds a prejudice or has  
13 previously demonstrated a bias against him. The allegation of bias is more appropriately brought  
14 in a motion for recusal or disqualification in a properly filed § 2255 motion. Until and unless  
15 petitioner demonstrates that a § 2255 motion is unavailable for some reason, then he may not  
16 proceed with a § 2241 petition.  
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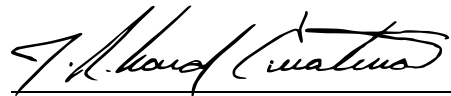
18 Accordingly, the undersigned finds no basis to entertain the instant petition. *See also*  
19 Tripati v. Henman, 843 F.2d 1160, 1163 (9th Cir.1988) (stating that alleged judicial bias does not  
20 demonstrate inadequacy where recusal or disqualification remedies are available). The court  
21 should deny the petition. To present his claims, he is required to present them in a motion to the  
22 Honorable Ronald B. Leighton pursuant to 28 U.S.C § 2255  
23

#### 24 CONCLUSION

25 This petition is without merit. This petition should be DENIED, and petitioner's claims  
26 and causes of action DISMISSED. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the

1 Federal Rules of Civil procedure, the parties shall have fourteen (14) days from service of this  
2 Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result  
3 in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985).  
4 Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the  
5 matter for consideration on April 9, 2010, as noted in the caption.  
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7 Dated this 15<sup>th</sup> day of March, 2010.

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10 J. Richard Creatura  
11 United States Magistrate Judge  
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